No. 607

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IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM J. HEITSCH, Executor of the Estate of JANET H. HEITSCH, deceased,
Appellant,

vs.

GILES KAVANAGH, United States Collector of Internal Revenue at Detroit, Michigan, (ALBERT M. MENNINGER, Director of Internal Revenue at Detroit, Michigan, Successor to GILES KAVANAGH, United States Collector of Internal Revenue at Detroit, Michigan),
Appellee.

BRIEF OF APPELLANT IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

ROBERT DAWSON HEITSCH,
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Business Address:
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AMERICAN BRIEF AND RECORD COMPANY, GRAND RAPIDS 2, MICHIGAN

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II. Do Sections 3760 (a) and (b) and 3761 (a) and (b) I. R. C.; 26.3760 (a) and (b) U. S. C. A. and 26.3761 (a) and (b) U. S. C. A. which expressly provide for compromises and settlement agreements as to federal taxes (in this case federal estate taxes levied under Section 810 I. R. C. (26.810 U. S. C. A.) and Section 935 I. R. C. (26.935 U. S. C. A.) render such taxes void because in violation of Article I, Section I, of the United States Constitution? 2

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I.

Does the determination that the constitutional questions raised with respect to Sections 3760 (a) and (b) and 3761 (a) and (b) I. R. C. is not properly before the court for adjudication because it was stipulated that no closing agreement or compromise was proposed or entered into in this case conflict with Ely-Walker Drygoods Co. v. United States, 34 Fed. 2d. 429, decided by the United States Court of Appeals, Eighth Circuit?

We submit that *U. S. Supreme Court Rule* 38, Section 5 (b), warrants review here because there is substantial conflict between the instant decision and the decision in *Ely & Walker Drygoods Co. vs. United States,* 34 Fed.

2d. 249 (certiorari denied 281 U. S. 735; 74 L. ed. 1165). In that case the court held that one who had made and executed a compromise as to tax liability could not thereafter question the validity of the tax. This was apparently based on Section 3760 (b) *I. R. C.* (quoted under No. II) following. Because of this decision and the refusal of this Court to grant certiorari to review it, plaintiff and appellant on advice of counsel paid the tax under express protests involving the constitutional questions here presented. Here the Circuit Court of Appeals, Sixth Circuit, holds that plaintiff and appellant has not shown that he is within the class of persons with respect to whom the act is claimed to be unconstitutional because it is stipulated that no closing agreement or compromise was proposed or entered into. (Third paragraph of decision).

II.

Do Sections 3760 (a) and (b) and 3761 (a) and (b) I. R. C.; 26.3760 (a) and (b) U. S. C. A. and 26.3761 (a) and (b) U. S. C. A., which expressly provide for compromises and settlement agreements as to federal taxes (in this case federal estate taxes levied under Section 810 I. R. C. (26.810 U. S. C. A.) and Section 935 I. R. C. (26.935 U. S. C. A.) render such taxes void because in violation of Article I, Section 1, of the United States Constitution?

Section 3760 (a) *I. R. C.*, 26.3760 (a) *U. S. C. A.*, provides:

> (a) Authorization — The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.
>
> (b) Finality — If such agreement is approved by the Secretary, the Under Secretary, or an Assistant Secretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing

of fraud or malfeasance, or misrepresentation, of a material fact —

(1) The case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

Section 3761 (a) *I. R. C.*, 26.3761 (a) *U. S. C. A.* provides:

(a) Authorization — The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of the Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) Record — Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of —

(1) The amount of tax assessed.

(2) The amourt of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise.

These provisions authorize representatives to the executive department of government to substitute a different figure for what the legislative department acting within its sphere has specified as the rate of taxation.

The record in this case contains the following concession:

> "As your Honor puts it, we have settled cases all the time and we could settle this case here if we could get together maybe, or not this case but maybe another case where there was a factual situation. Why, we do that all the time. The Government would be very, very hampered in its functioning if the administrative body could not do that. So we think that is a proper administrative duty, the administration of these taxes. Sometimes there are questions that have to be settled factually and otherwise." (134-135 printed record).

The general proposition of the delegation of a legislative function to some other department of government is condemned in:

> *Panama Refining Co. vs. Ryan,* 293 U. S. 388, 420, 79 L. ed. 446, 458, and
> *Schechter vs. United States,* 295 U. S. 495, 529, 79 L. ed. 1570, 1580.

The fundamental objection to such a delegation is that it results in government by individuals as opposed to government by Law. A tax collecting plan authorizing compromise or modification by the tax administration officials was held to be subject to this infirmity in *Richey vs. Wells,* 123 Fla. 284; 166 So. 817. The reasoning is fundamentally sound. On the basis of these authorities we believe this is a substantial question.

III.

Do said sections 3760 (a) and (b) and 3761 (a) and (b) I. R. C. result in a violation of the uniformity requirement of Section 8, Article I, of the Constitution of the United States?

We quote from the decision of the lower court on this point:

> "Opportunities to settle and compromise disputes as to the existence of tax liabilities are available to

all tax-payers throughout the nation under the existing provisions of the Internal Revenue Code. Hence the federal estate tax statute meets the constitutional test of uniformity." (Third paragraph before conclusion in opinion.

This argument does not square with reality. In view of the expanse and the extent of the population of this country "The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service" must include a host of persons. Their reactions, motives and judgments must be as various as their number. Results are tabulated from reported federal cases where such compromises were involved.

Reports	Summary of Results		
	Amount Assessed or claimed	Amount paid under compromise	%
1. *Walker vs. Alamo Foods*, 16 Fed. 2d. 694	$ 342,697.75	$ 318,039.70	92.83
2. *Ely & Walker Drygoods Co. vs. U. S.*, 34 Fed. 2d. 429	960,093.51	672,065.46	70.00
3. *DePuy vs. U. S.*, 35 Fed. 2d. 990	3,173,293.01	1,972,016.81	62.14
4. *Hoad vs. U. S.*, 59 Fed. 2d. 125	1,537.57	729.73	47.46
5. *Backus vs. U. S.*, 59 Fed. 2d. 242	1,600,000.00	788,879.21	49.30
6. *Staten Island Hygeia Ice & Cold Storage Co. vs. U. S.*, 85 Fed. 2d. 68	529.05	25.00	4.72
7. *Cloister Printing Co. vs. U. S.*, 100 Fed. 2d. 355	3,360.00	1,000.00	29.76

If pictured in graphical form uniformity should present a straight line or at least a line curving smoothly. A graph of the above percentages would result in a very

crooked broken line. Some of these decisions would appear to present obvious phases, to-wit:

No. 2, Settlement at an arbitrary percentage.
No. 6, Acquiesence in the face-saving of an administrative officer.
No. 7, Settlement at an arbitrary figure.
Nos. 1, 3, 4, 5, Quaere.

These cases demonstrate that there cannot be uniformity of compromise in fact or theory. We get back to the same proposition that government should be by law, not by individual whim, caprice or judgment. On this basis we submit the question is substantial.

IV.

Do said sections result in a violation of the due process clause of the Fifth Amendment of the Constitution of the United States?

In *Heiner vs. Donan,* 285 U. S. 312, 76 L. ed. 772, Syllabus No. 4 reads as follows:

> "4. The restraint imposed upon legislation by the due process clause of the Fifth and Fourteenth Amendments is the same."

The same language is found in the text of the opinion at 285 U. S. 326; 76 L. Ed. 799. It is supported by citation of *Coolidge vs. Long,* 282 U. S. 582, 596; 75 L. Ed. 562, 566, 51 S. C. A. 306.

See also:

> *Curry vs. McCanless,* 307 U. S. 357, 369; 83 L. Ed. 1339, 1349 (Headnotes 15 and 16).

We believe there is no sound reason why the Fifth Amendment should not be applied to federal laws on the same basis that the Fourteenth Amendment is applied to state laws. There is no express requirement in the federal constitution for uniformity of state taxation or uniformity of administration of state tax laws by state officials.

The question of uniformity of administration of state tax laws was before this court in:

Sioux City Bridge Co. vs. Dakota County, 260 U. S. 441, 67 L. Ed. 340;
Cumberland Coal Co. vs. Board of Revision, 284 U. S. 23, 76 L. Ed. 146;
Iowa Des Moines National Bank vs. Bennett, 284 U. S. 239, 76 L. Ed. 265, 28 A. L. R. 979;
Hillsboro Township vs. Cromwell, 326 U. S. 620, 90 L. Ed. 358.

We quote from *Hillsboro Township vs. Cromwell*, 326 U. S. 620, 624; 90 L. Ed. 358, 363:

> "The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class."

The "discrimination" referred to in the foregoing sentence and in the other cases cited under this heading arose from the fact that the letter of the law was enforced against the complaining taxpayer. The taxation would have been uniform if it had been so enforced as to others; but a different and less burdensome rule was applied to others by the tax administrative branch of the state government. The practice was condemned on the basis that it violated the 14th amendment to the United States as to those persons against whom the tax law was enforced as written.

In view of the express command of uniformity of Federal taxation in Article I, Section, 8, U. S. Constitution, we submit that the instant case presents a stronger case for the taxpayer in this case than was involved in the cases cited under this heading. For this reason we believe this question is substantial.

V.

Does the wide variance between estate tax rates levied under Section 810 I. R. C. and 935 I. R. C. (Sections 26.810 and 26.935 U. S. C. A.) as of November 8, 1941, and the taxes levied under the gift tax rates, Section 1001 I. R. C. (Section 26.1001 U. S. C. A.) constitute an attempt on the part of the United States government to influence persons in the disposition of their estates in violation of the Fifth and Tenth Amendments of the Constitution of the United States?

The court has uniformly held over from an early date in its history that the transfer of property by will or descent is an exclusive function. It follows that it is reserved to the state by the Tenth Amendment to the constitution:

Mager vs. Grima, 8 How. U. S. 490; 12 L. Ed. 1168, 1170;
Magoon vs. Scales, 76 U. S. 23, 27; 19 L. Ed. 545, 546;
United States vs. Fox, 94 U. S. 315, 320; 24 L. Ed. 192, 193;
Jones vs. Habersham, 107 U. S. 174, 179; 27 L. Ed. 401, 403;
Vaughan vs. Hutchinson, 165 U. S. 566, 569, 41 L. Ed. 827, 829;
Clarke vs. Clarke, 178 U. S. 186; 44 L. Ed. 1028;
Campbell vs. California, 200 U. S. 87, 94; 50 L. Ed. 382, 387;
United States vs. Burnison, 339 U. S. 87; 94 L. Ed. 675.

A new schedule of added federal estate rates, 1001 I. R. C. 26.1001 U. S. C. A., and gift tax rates, 935 I. R. C., 26.935 U. S. C. A. was enacted by the revenue act of 1941. Prior to this amendment this court had decided:

Milliken vs United States, 283 U. S. 15; 75 L. Ed. 809;
Burnet vs. Guggenheim, 288 U. S. 280; 77 L. Ed. 748, and
In re *Sanford's Estate*, 308 U. S. 39; 84 L. Ed. 20.

One phase of those cases is summarized in the following from In re *Sanford's Estate,* 308 U. S. 39, 42; 84 L. Ed. 20, 22:

> "In ascertaining the correct construction of the statutes taxing gifts, it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death, as they have been interpreted by our decisions. Sections 319 et seq. of the Revenue Act of (June 2) 1924, 43 Stat. at L. 253, Chap. 234, re-enacted at 501 et seq. of the (June 6) 1932 Act, 47 Stat. at L. 169, Chap. 209, 26 USCA 550, imposed a graduated tax upon gifts. It supplemented that laid on transfers at death, which had long been a feature of the revenue laws. When the gift tax was enacted Congress was aware that the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title. See *Burnet vs. Guggenheim,* 288 U. S. 280, 287, 77 L. Ed. 748, 752, 53 S. Ct. 369."

By the 1941 Revenue Act, Congress, charged with notice of these decisions, made this change in rates of estate taxes effective from and after the date of adoption, September 20, 1941 (Sec. 401C Revenue Act 1941), but postponed the increase in gift tax rates (Sec. 1001 I. R. C., 26.1001 U. S. C. A., 402 (a) Revenue Act 1941) to January 1, 1942. Prior to the adoption of the 1941 Revenue Act and after January 1, 1942, there was a consistent ratio between the estate tax rates established by Section 935 I. R. C., 26.935 U. S. C. A., and the gift tax rates established by Section 1001 I. R. C., 26.1001 U. S. C. A., to-wit the rate of 4 to 3 This ratio existed when *Milliken vs. The United States, Burnet vs. Guggenheim,* and In re *Sanford's Estate,* all supra, were decided. The effective date for taxation of this estate under Sections 810 I. R. C., 26.810 U. S. C. A., and 935 I. R. C., 26.935 U. S. C. A., was November 8, 1941. On that date the ratio between estate tax rates and a combination of estate tax rates and gift tax rates for persons not excluded from the exercising the gift tax by section 811 (c) I. R. C., 26.811 (c) U. S. C. A., was approximately 4 to 1 instead of 4 to 3. This follows

because Congress postponed the effective dates of the new gift tax rates to January 1, 1942, but made the new estate tax rates effective on the date of enactment.

This has all the earmarks of a bargain offer to induce action by individuals effecting and controlling a function reserved to the states by the Tenth Amendment.

> In *Bailey vs. Drexel Furniture Co.* 259 U. S. 20, 66 L. Ed. 817, 21 A. L. R. 1432;
> *United States vs. Butler,* 297 U. S. 1; 80 L. Ed. 477, 102 A. L. R.;
> *Carter vs. Carter Coal Co.,* 298 U. S. 238; 80 L. Ed. 1160,

this court held that such a purpose may not be legally accomplished in the guise of a tax law.

We quote also from *Gregg Dying Co. vs. W. G. Querry,* 286 U. S. 472, 476; 76 L. Ed. 1232, 1236:

> "In maintaining rights asserted under the Federal Constitution, the decision of this Court is not dependent upon the form of a taxing scheme, or upon the characterization of it by the state court. We regard the substance rather than the form, and the controlling test is found in the *operation and effect of the statute as applied and enforced by the State.* St. Louis S. W. R. Co. vs. Arkansas, 235 U. S. 350, 362, 59 L. Ed. 265, 271, 35 S. Ct. 99; Hanover F. Ins. Co., vs. Harding (Hanover F. Ins. Co.. vs. Carr), 272 U. S. 494, 509, 510, 71 L. Ed. 372, 380, 49 A. L. R. 713, 47 S. Ct. 179" (Italics ours).

The contention here made was overruled in the second paragraph before the conclusion in the opinion of the court below on the basis that the deceased had not attempted to exercise the gift tax privilege and that plaintiff is not in a position to raise the question. We contend that having paid the tax under protest based upon this specific reason among others, the issue should not be evaded in this manner.

The statement in the lower court's opinion in the last paragraph: "The motives of Congress in enacting laws are beyond the scope of judicial inquiry for the purpose of questioning such legislation", is in direct conflict with

the decisions in *Bailey vs. Drexel Furniture Co.; United States vs. Butler; Carter vs. Carter Coal Co.* and *Gregg Dying Co. vs. W. G. Querry,* all supra. If the doctrine were adopted where constitutional limitations are brought in question, it would eliminate one of the most important functions of the judicial branch of the government. For these reasons we believe this question is substantial.

The will of the deceased is dated August 22, 1941 (20 Circuit Court of Appeals Record). During the month of August, 1941 she was confined to the Simpson Memorial Hospital at Ann Arbor, Michigan, suffering from her last illness (24, 100, Circuit Court of Appeals Record). The last sentence of Sec. 811 (c) I. R. C., 26.811 (c) U. S. C. A., reads:

> "Any transfer of a material part of his property in the nature of a final disposition thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this sub-chapter."

We submit that this provision presents as to this estate, the same class of arbitrary enactment which was held in: In *Heiner vs. Donnan,* 285 U. S. 312, 76 L. Ed. 772, to be in violation of Amendment V of the United States Constitution. The re-enactment of Section 811 (c) I. R. C., 26.811 (c) U. S. C. A., on September 20, 1941, as part of the code virtually commanded that this estate pay according to the new rates set up in Section 935 I. R. C., 26.935 U. S. C. A., while permitting persons with similar estates who were in good health on September 20, 1941, to dispose of their estates in a manner calling for about one-fourth as much tax, even though such other persons may have also died on November 8, 1941, or any other date between September 20, 1941, and December 31, 1941. For this further reason we think this point is substantial.

VI.

Are the rates effective November 8, 1941, under Section 935 I. R. C., Section 26.935 U. S. C. A., so excessive as to constitute the taking of property contrary to the due process clause of the 5th and 10th Amendments to the Constitution of the United States?

If the federal government may not attempt to exercise a control over state functions under the guise of a tax law as held in *Bailey vs. Drexel Furniture Co.*, 259 U. S. 20, 66 L. Ed. 817; 21 A. L. R. 1432; *United States vs. Butler*, 297 U. S. 1, 80 L. Ed. 477; 102 A. L. R. 914, and *Carter vs. Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160, it stands to reason that there must be a limit as to how far it may by a tax law disrupt or prevent the operation of such a function — in this case the descent or distribution of property on death. Any other conclusion would conflict with the holding in *United States vs. Burnison*, 339 U. S. 87; 94 L. Ed. 675.

We seek a judicial determination here as to whether there has been such a substantial encroachment as to be in violation of the Tenth Amendment of the United States Constitution. This question is clearly stated in the first paragraph of the opinion of the court below as one of the questions raised. The affirmation of the decision of the trial court overrules the contention. For the reasons here outlined we believe the question is substantial.

VII.

Should Albert M. Menninger, Federal Director of Internal Revenue at Detroit, Michigan, be substituted as defendant and appellee for Giles Kavanagh, Federal Collector of Internal Revenue at Detroit, Michigan.

On January 21, 1953, we forwarded to the Circuit Court of Appeals of the Sixth Circuit, a motion to substitute Albert W. Menninger, Director of Internal Revenue at Detroit, Michigan, as defendant and appellee for Giles

Kavanagh, Collector of Internal Revenue at Detroit, Michigan, because:

1. The office of director of internal revenue has been substituted for that of collector of internal revenue;
2. Giles Kavanagh has since died.

Supporting brief accompanied the motion and was noticed for hearing February 2, 1953. This motion was served by registered mail upon Albert M. Menninger, and by regular mail upon the District Attorney, Phillip Hart, whose name is published in the Circuit Court of Appeals calendar as attorney for defendant and appellee.

The Clerk of the Circuit Court of Appeals returned the motion questioning the right or advisability of filing it in that court. At about the same time we received a telegram dated January 29, 4:57 P. M. from Charles C. Lyon, Assistant Attorney General, Washington, D. C., asking for an adjournment "to afford the government an opportunity to consider whether the substitution requested in the motion is necessary or proper." The motion was promptly returned to the Circuit Court of Appeals, Sixth Circuit, with the suggestion (copy to Mr. Lyon) that it should not be continued to a date later than February 9, 1953, because the time in which to apply for this writ of certiorari expires February 17, 1953.

We are now in receipt of a certified copy of the petition filed as of February 2, 1953, and file the same herewith. We respectfully ask that the substitution be here made or considered made if certiorari is granted. The time required for printing this brief and the accompanying application make it impractical to await the determination of the court of appeals on this motion.

Statutory clarification of the situation is established by Section 3 (a) and (b) Public Law 567, 82nd Congress, second Session, July 16, 1952. It provides:

> "(20.977) Sec. 3 of Public Law 567, 82nd Congress, 2nd Session, July 16, 1952. —
>
> Clarification of Existing Law as to Jury Trial in Actions for Recovery of Internal Revenue Taxes.
>
> Sec. 3 (a) Nothing in Reorganization Plan Numbered 26 of 1950 or Reorganization Plan Numbered 1 of 1952 shall be construed to impair any right or

remedy, including trial by jury, to recover any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority, or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

(b) For the purpose of any action to recover any such tax, penalty, or sum, all statutes, rules, and regulations referring to the collector of internal revenue shall be deemed to refer to the officer whose act or acts referred to in subsection (a) gave rise to such action. The venue of any such action shall be the same as under existing law."

(copied from Prentice Hall Federal Tax Guide 1953, page 20,062, Section 20.977).

Specific authority to make such substitution in either court of origin or any appellate court is found in Section 11 (a) of Act of February 13, 1925, Chapter 229, 43 Stat. 936 (Lawyers Co-operative Publishing Company U. S. Supreme Court Digest 1949, Vol. entitled Constitution and Rules, pages 39 and 40).

CONCLUSION

For the reasons outlined above we hereby apply for a writ of certiorari to the United States Court of Appeals, Sixth Circuit, to review the decision in this case, and for substitution of Albert M. Menninger, Director of Internal Revenue at Detroit, Michigan, as party defendant and appellee, for Giles Kavanagh, Collector of Internal Revenue at Detroit, Michigan.

Respectfully submitted,

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